IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SADIE COTTER,
Plaintiff in Error,
vs.
FRANK J. COTTER,
Defendant in Error.

No. 2532

ERROR TO THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, THIRD DIVISION.

Brief of Plaintiff in Error.

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Brief of Plaintiff in Error.

STATEMENT.

This action was brought by the plaintiff in error to recover judgment against the defendant in error on a decree made and entered on the 14th day of May, 1913, by the Superior Court of the State of Washington, for King County, wherein said Court decreed a dissolution of the bonds of matrimony theretofore existing between the plaintiff in er-

ror and the defendant in error, and awarded the plaintiff in error permanent alimony in the sum of fifty dollars ($50) per month, and further directed that the defendant in error pay certain outstanding indebtedness of the plaintiff in error, in the sum of seven hundred fifty dollars ($750.00). The defendant in error demurred to the complaint on the following grounds, to-wit:

1st. That the Court had no jurisdiction of the subject matter of the action.

2nd. That the plaintiff has no legal capacity to sue.

3rd. That the plaintiff's complaint does not state facts sufficient to constitute a cause of action against this defendant.

The Court sustained the demurrer of the defendant in error and dismissed the action.

SPECIFICATION OF ERRORS.

1. The Court erred in making and entering its order, on the 16th day of October, 1914, sustaining the demurrer of the defendant to the complaint filed by the plaintiff on the 13th day of August, 1914, and in deciding that such complaint does not state facts sufficient to constitute a cause of action, in favor of the plaintiff and against the defendant.

2. The Court erred in making and entering its order and judgment on the 16th day of October, 1914, wherein and whereby it ordered and adjudged that plaintiff's complaint and action be

dismissed upon the merits, and that defendant recover from said plaintiff his costs in said action.

ARGUMENT.

The two assignments of error may be considered and discussed under one head.

While the Court apparently sustained the demurrer on all of the grounds assigned therein, it cannot be seriously contended that the trial court was without jurisdiction of the subject matter of the action, as the trial court has jurisdiction of any action on a judgment or decree of a sister state or territory.

"The acts of the legislature of any state or territory or of any country subject to the jurisdiction of the United States shall be authenticated by having the seals of such state, territory or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

U. S. Rev. St., Sec. 905.
U .S. Comp. St. (1901), p. 677.

It is equally obvious that the second ground of the demurrer is without merit, for any person who

has recovered a valid judgment can maintain an action on such judgment in a sister state or territory. The only point to be considered is whether or not the plaintiff sued in this action on a valid judgment, and that question can be determined by ascertaining whether or not the complaint states a cause of action. The insufficiency of the complaint in that respect is the third and last ground assigned in the demurrer as a reason for the dismissal of the action.

We contend that the complaint does state a cause of action, for the following reasons:

I.

Because the complaint alleges in paragraphs four (4) and six (6), (Tr. 2 and 3), that there was at the time of the commencement of the action, accrued and unpaid alimony due on the decree in suit from the defendant in error to the plaintiff in error, the sum of six hundred fifty dollars ($650.00).

II.

Because paragraph five (5) of the complaint, (Tr. 2) alleges that the decree in suit directed the defendant in error to pay certain outstanding indebtedness of the plaintiff in error, in the sum of seven hundred fifty dollars ($75.00), and that defendant in error has paid no part thereof except

the sum of one hundred twenty dollars ($120.00).

On the subject of over-due alimony, the complaint alleges among other things (Tr. pp. 1-4), that the Superior Court of the State of Washington for King County, was at all times mentioned therein a court of general jurisdiction; that on the 27th day of January, 1913, the plaintiff in error commenced an action for a divorce in said court against the defendant in error; that said defendant in error was duly served with process therein, and on the 8th day of May, 1913, appeared in said action and submitted himself to the jurisdiction of the Court.

That thereafter, on the 14th day of May, 1913, such proceedings were had in said Court and cause whereby a decree was duly given, made, entered, enrolled and docketed in said Court, in favor of the plaintiff in error dissolving the bonds of matrimony which then existed between the plaintiff in error and the defendant in error.

That said decree further provided and ordered that the defendant in error pay to the plaintiff in error, as permanent alimony, the sum of fifty dollars ($50.00) per month, the same to be paid on the first day of each and every month from the date of the entry of said decree.

That said decree further provided that the defendant in error should pay certain outstanding indebtedness incurred by the plaintiff in error, in the sum of seven hundred fifty dollars ($750.00);

that no part of the same has been paid except the sum of one hundred twenty dollars ($120.00), and that there is now due and owing the plaintiff in error from the defendant in error, the sum of six hundred thirty dollars ($630.00), together with interest thereon at the rate of eight per cent (8) per annum from date until paid.

That the defendant in error has not paid said alimony, or any part thereof, and that there is now due and owing on account of the same from the defendant in error to the plaintiff in error, the full sum of six hundred fifty dollars ($650.00), together with interest thereon at the rate of eight per cent (8) per annum from date until paid.

That no appeal has been taken by the defendant from the entry or provision of said decree, nor has the same been set aside or modified in any way and such decree and the whole thereof is now in full force and effect.

That said Superior Court for King County, in the State of Washington, is duly empowered and authorized under the laws of said state to grant permanent alimony, as provided by said decree,—a copy of the Statutes of the State of Washington relative thereto being as follows, and hereby made a part of this complaint:

"In granting a divorce the Court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the merits of the parties and to the con-

dition in which they shall be left by such divorce, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, support and education of the minor children of such marriage."

The section of the Statute of the State of Washington under and by virtue of which the Washington Court entered the decree awarding alimony to the plaintiff in error, the force and effect of which is set out in the complaint, provides as follows:

"In granting a divorce, the Court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the merits of the parties and to the condition in which they shall be left by such divorce, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, support and education of the minor children of such marriage."

Remington & Ballinger's Code, Section 989.

That the Superior Court of the State of Washington was authorized to enter a decree awarding permanent alimony in a suit for divorce under the section of the statute, supra, is upheld by numerous decisions of the Supreme Court of that State.

In re Cave, 26 Washington, 213.
Markawski vs. Markawski, 44 Washington, 594.
Claiborne vs. Claiborne, 47 Washington, 200.
Ramsdell vs. Ramsdell, 47 Washington, 444.

The Supreme Court of the State of Washington has also held that the awarding of perma-

nent alimony in monthly installments until the further order of the Court, does not preclude the Court from subsequently, upon application, discontinuing the alimony permanently.

Mahncke vs. Mancke, 43 Washington, 425.

But the Supreme Court of that State has also held that there is no power in the Court under the statute to cancel alimony which had already accrued and was due the plaintiff in error under the decree.

In *Harris vs. Harris*, 71 Washington, 307, the Court says, on page 309:

"The only final feature of a judgment of this character is as to each installment of alimony as it becomes due. As to these installments, the rights and liabilities of the parties become absolute and fixed at the time provided in the decree for their payment, and to this extent the judgment is a final one."

Beers vs. Beers, 74 Washington, 458, wherein the Court, on page 461, says:

"On the question of the power of the Court to modify a decree as to these installments of alimony past due and unpaid, the law appears to be that such power does not exist. The rights and liabilities of the parties with reference to such installments become absolute and fixed at the time provided in the decree for their payment, and as to such, the decree is not subject to modification."

The trial court evidently proceeded on the theory that the Court of the State of Washington, which made and entered the decree, had power to set aside and cancel the provisions of the decree

relating to alimony, regardless of whether or not such alimony had already accrued. The question as to the power of the Court to set aside and cancel a decree as to over-due alimony has been before the Supreme Court of the United States on three different occasions:

Barber vs. Barber, 62 U. S. (21 How.), 582.
Lynde vs. Lynde, 181 U. S. 183.
Sistare vs. Sistare, 218 U. S. 1, 30 Sup. Ct. Rep. 692.

In re *Barber vs. Barber, Supra*, suit was brought in the District Court of the United States, for the District of Wisconsin, by Mrs. Barber, through her next friend, George Cronkhite, a citizen of the State of New York, against Hiram Barber, a citizen of the State of Wisconsin, on a decree entered by a court of general jurisdiction in the State of New York, providing for the payment, in quarterly installments, of the annual sum of three hundred sixty dollars ($360.00) alimony, each and every year. The complaint, among other things, set out the proceedings of the Court in the State of New York, divorcing Mr. and Mrs. Barber from bed and board, and alleging that the defendant had not paid any part of the alimony adjudged to Mrs. Barber, and that there was then due to her on that account the sum of $4242.15. The trial court entered a decree in favor of the plaintiff, and the Supreme Court, in affirming the judgment, among other things, said:

"The parties to a cause for divorce and for alimony are as much bound by a decree for both, which has been given by one of our State Courts having jurisdiction of the subject matter and over the parties, as the same parties would be if the decree had been given in the ecclesiastical Court of England. The decree of both is a judgment of record and will be received as such by other courts. And such a judgment or decree rendered in any state of the United States, the court having jurisdiction, will be carried into judgment in any other state to have the same binding force that it has in the state in which it was originally given. For such a purpose, both the equity courts of the United States and the same courts of the states have jurisdiction."

It may be contended that *Barber vs. Barber* has been overruled by *Lynde vs. Lynde, Supra,* and it is true that some of the language used in *Lynde vs. Lynde* might warrant such an inference. But it will be observed on a careful reading of the whole case that it was not the intention of the Court to overrule *Barber vs. Barber,* for the opinion does not refer to the latter case.

The Court, in *Sistare vs. Sistare, Supra,* limits the force and effect of the opinion in *Lynde vs. Lynde,* to the extent that the power of the Court to modify a decree for alimony cannot apply to overdue alimony unless such power is specifically granted to the court by statute.

The opinion in *Sistare vs. Sistare* is exhaustive, and the limitations on the power of the Court to disturb judgments or decrees for overdue alimony

are carefully analyzed. In the course of the opinion in that case, the Court says:

"We think the conclusion is inevitable that the Lynde case cannot be held as overruling the Barber case, and therefore that the two cases must be interpreted in harmony one with the other, and in so doing it results: * * *

That generally speaking, where a decree is rendered for alimony, and is made payable in future installments, the right to such installments become absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the installments."

The Court further says, in the course of the opinion:

"In considering the meaning of these provisions, it must be borne in mind that the settled rule in New York is that the Courts of that state have only the jurisdiction over the subject of divorce, separation and alimony conferred by statute, and that the authority to modify or amend a judgment awarding divorce and alimony must be found in the statute or it does not exist."

And further, the Court says:

"Other than the provision in Section 1767, authorizing the revocation of a judgment for separation upon the joint application of the parties, the power of the court to vary or modify a judgment for alimony, if it existed in 1899, was to be found in Section 1771. It is certain that authority is there given to the Courts of New York to modify or vary a decree for alimony by the following: 'The Court may, by order, upon the application of either

party to the action, after due notice to the other, to be given in such manner as the Court shall prescribe, at any time after final judgment, vary or modify such directions. But no such application shall be made by a defendant unless leave to make the same has been previously granted by the Court by order made upon, or without, notice, as the Court in its discretion may deem proper after presentation to the Court of satisfactory proof that justice requires such an application should be entertained.' But it is equally certain that nothing in this language expressly gives power to revoke or modify an installment of alimony which had accrued prior to the making of an application to vary or modify, and every reasonable implication must be resorted to against the existence of such power in the absence of clear language manifesting an intention to confer it. The implication, however, which arises from the failure to expressly confer authority to retroactively modify an allowance of alimony is fortified by the provisions which are expressed. Thus, the methods of enforcing payments of future alimony awarded, provided by statutes, all contemplate the collection and paying over as a matter of right, of installments as they accrue, as long as the judgment remains unmodified, or at least until application has been made or permission to make one in pursuance to the statute has been accorded. And the force of this suggestion is accentuated when it is considered that it was not unusual in New York to resort to executions as upon a judgment at law, to enforce the collection of unpaid installments of alimony. *Wetmore vs. Wetmore*, 149 N. Y. 520. 527; 33 L. R. A. 708; 52 Am. St. Rep. 752; 44 N. E. 169. Indeed, as in principle, if it be that the power to vary and modify operates retroactively and may affect past-due installments so as to relieve of the obligations to pay such installments, it would follow, in the nature of things, that the power would exist to increase the

amount allowed, it is additionally impossible to imply such authority in the absence of provisions plainly compelling to such conclusion. Beyond all this, when it is considered that no provision is found looking to the repayment by the wife of any installments which had been collected from the husband in the event of retroactive reduction of the allowance, it would seem that no power to retroactively modify was intended."

It is rarely that a Court in any case will enter a decree for the payment of a certain lump sum of alimony, for the reason that the party required by the Court to pay such alimony may be, and usually is, unable financially to pay such a sum as the Court might feel warranted in entering in lieu of alimony in the form of installments in the future, and if a judgment for past-due installments of alimony cannot be enforced, in a sister state or territory, any party required to pay alimony can avoid all liability under such a judgment by changing his residence to another state or territory, and he would be relieved of all his obligations to provide for the support of his children and his divorced wife, and thereby render the provisions of the decree, compelling him to make provision for their support, nugatory. It seems to us that the opinion of Chief Justice White, in *Sistare vs Sistare, Supra,* clearly discloses the unsoundness of the doctrine which the trial court in the case at bar must have adopted in sustaining the demurrer.

The question as to the right of a party to

sue on a judgment for past due installments of alimony in a sister state or territory has been considered in the late case of *Gilbert vs. Hayward*, reported in 92 Atl. Rep. p. 625, No. 9 Advance Sheets, 625, where a great many cases are cited and the rule laid down in *Sistare vs. Sistare, Supra*, is followed.

We contend that the demurrer should also have been overruled for the second reason assigned in this brief. Paragraph 5, page 2, of the Transcript, alleges that the decree further provided that the defendant in error should pay certain outstanding indebtedness of the plaintiff in error, in the sum of seven hundred fifty dollars ($750.00); that no part of the same has been paid except the sum of one hundred twenty dollars ($120.00), and that there is now due and owing from the defendant in error to the plaintiff in error the sum of six hundred thirty dollars ($630.00).

It is true it is not alleged that the provision in the decree referred to directs the defendant in error to pay the plaintiff in error a specified sum of money, but it does direct the defendant in error to pay said indebtedness for the plaintiff in error, and it is alleged that the defendant in error had failed to comply with the mandate of the decree in that respect. It may be contended that the beneficiary under such provision of the decree is the creditor of the plaintiff in error, and therefore that such creditor is the only party who could main-

tain an action to enforce that provision of the decree; but we submit that the plaintiff in error, being the record owner of the judgment, and for whose benefit the Court directed the defendant in error to pay the indebtedness referred to, is the person at whose instance this particular provision of the decree should be enforced.

"An action on a judgment must be prosecuted by the real and beneficial owner of it, whose title to it must appear of record or by some formal transfer, and the suit cannot be maintained by a third person not answering these conditions, although the judgment may in some way define his right or inure to his benefit or protection."

23 Cyc. 1507.

Kohlberg vs. Benton, 45 Calif. 265.

Taylor's Appeal, 45 Pa. St. 71.

It is respectfully submitted that the judgment of the Trial Court should be reversed and a new trial granted.

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